

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BARBARA J. HANDELONG,
Plaintiff,

v.

JO ANNE B. BARNHART,
COMMISSIONER OF
SOCIAL SECURITY,
Defendant.

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CIVIL ACTION

NO. 03-CV-6478

Diamond, J.

November 18, 2004

MEMORANDUM

Plaintiff Barbara J. Handelong asks this Court to overturn the decision of the Commissioner of Social Security denying her claim for disability benefits under Title II of the Social Security Act. I deny Plaintiff's Motion.

HISTORY

Plaintiff, who was 46 years old when she filed her disability claim in 1997, did not complete high school and has no trade or vocational training. (Tr. 23, 56, 118, 442). Until 1986, Plaintiff worked as a sewing machine operator at a manufacturing plant. From 1987 to 1988, she was self-employed cleaning homes. In 1991, Plaintiff worked as a dishwasher in a restaurant. In 1992, she worked as a cleaner at a fast food restaurant and collected tickets at a local park. In January 1994, Plaintiff began working as a sewing machine operator in a clothing factory. Severe back pain purportedly caused Plaintiff to miss work and lose this position.

Plaintiff applied for disability insurance benefits in October 1997, claiming that

she had been disabled since February 12, 1997. 42 U.S.C. § 405(g). At Plaintiff's request, the ALJ held a hearing on December 21, 1998. Plaintiff testified, as did Chiropractor Thomas F. Snyder, and an independent vocational expert, Don Millin. Plaintiff alleged disability because of severe back pain, radiating pain in her legs, severe migraine headaches, anxiety, depression, asthma, and carpal tunnel syndrome. (Tr. 60, 62). She alleged that she has had lower back pain since 1972, when her ex-husband threw her down a flight of stairs. (Tr. 197).

The ALJ postponed his decision until after a government mental health examiner could assess Plaintiff's complaints of anxiety and depression. The ALJ held a second hearing on October 15, 1999, during which Plaintiff testified, as did a second independent vocational expert, Rosalyn Sampson. In a decision dated November 22, 1999, the ALJ determined that claimant was able to perform her past relevant work as a sewing machine operator, and, as a result, was not "disabled" within the meaning of the Social Security Act. The Appeals Council denied review on July 3, 2000.

On appeal, this Court remanded for reconsideration. A new ALJ held a third hearing on July 2, 2003. Plaintiff testified, as did a third independent vocational expert, Carolyn Rutherford. At Plaintiff's request, the ALJ incorporated the record from the two prior hearings. On August 4, 2003, the new ALJ also concluded that Plaintiff was not disabled within the meaning of the Social Security Act on or before her last date insured. (Tr. 339). The ALJ found that Plaintiff's physical conditions -- whether singly or in combination -- were severe; however, Plaintiff's mental condition and asthma were "non-severe" impairments. (Tr. 340, 350, 342; Joint Statement of Undisputed Facts, 6). The ALJ concluded that Plaintiff was unable to perform any of her past relevant work, but had sufficient residual functional capacity to perform a

significant number of jobs involving sedentary work. (Tr. 350). Thus, Plaintiff failed to qualify for disability benefits under the Social Security Act.

Plaintiff timely filed a Complaint with this Court, seeking review of the ALJ's decision. 42 U.S.C. § 405(g). After both parties moved for Summary Judgment, the matter was referred to Chief Magistrate Judge M. Faith Angell, who, on September 1, 2004, recommended that I grant summary judgment in the Commissioner's favor. Plaintiff has submitted Objections to Judge Angell's Report and Recommendation.

STANDARD OF REVIEW

Judicial review of a Social Security claim is based upon the pleadings and the transcript of record. 42 U.S.C. § 405(g). The scope of review is "limited to determining whether the Commissioner applied the correct legal standards, and whether the record, as a whole, contains substantial evidence to support the Commissioner's findings of fact." Frazier v. Apfel, No. 99-715, 2000 U.S. Dist. LEXIS 3105, *3 (E.D. Pa. Mar. 7, 2000) (citing Berger v. Apfel, 200 F.3d 1157, 1161 (8th Cir. 2000)); see also Schmidt v. Apfel, 201 F.3d 970 (7th Cir. 2000); Tejada v. Apfel, 167 F.3d 770, 773 (2d Cir. 1999). The Court exercises plenary review over questions of law. Finkelstein v. Sullivan, 924 F.2d 483, 486 (3d Cir. 1991). The Court reviews findings of fact for "substantial evidence," defined as "that which would be sufficient to allow a reasonable factfinder to reach the same conclusion; while it must exceed a scintilla, it need not reach a preponderance of the evidence." Montes v. Apfel, No. 99-2377, 2000 U.S. Dist. LEXIS 4030, *2 (E.D. Pa. Mar. 27, 2000) (citing Richardson v. Perales, 402 U.S. 389, 401, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1972)). It is the responsibility of the ALJ, not the District Court, to assess the credibility of witnesses and resolve conflicts in the evidence. Perry v. Barnhart, No. 02-1289,

2003 U.S. Dist. LEXIS 24663, *18-19 (E.D. Pa. Sep. 26, 2003); Perez v. Barnhart, No. 02-5684, 2003 U.S. Dist. LEXIS 9803, *4 (E.D. Pa. May 27, 2003). If the ALJ's findings are supported by substantial evidence, the District Court is bound by them even if the Court would have found different facts. Fagnoli v. Massanari, 247 F.3d 34, 38 (3d Cir. 2001) (citing Hartranft v. Apfel, 181 F.3d 358, 360 (3d Cir. 1999)).

The District Court is obligated to give the Commissioner's decision great deference. Montes v. Apfel, No. 99-2377, 2000 U.S. Dist. LEXIS 4030, *2 (E.D. Pa. Mar. 27, 2000). Furthermore, the Court may not "conduct *de novo* review of the Commissioner's decision or re-weigh the evidence of record." Palmer v. Apfel, 995 F. Supp. 549, 552 (E.D. Pa. 1998).

The extent of District Court review of a Magistrate Judge's Report is committed to the Court's discretion. Jozefick v. Shalala, 854 F. Supp. 342, 347 (M.D. Pa., 1994). See Thomas v. Arn, 474 U.S. 140, 154 (1985); Goney v. Clark, 749 F.2d 5, 7 (3d Cir. 1984); Heiser v. Ryan, 813 F. Supp. 388, 391 (W.D. Pa. 1993), aff'd, 15 F.3d 299 (3d Cir. 1994). The District Court must review *de novo* those portions of the Report to which objection is made. 28 U.S.C. § 636 (b)(1)(C) (2004). The judge may "accept, reject or modify, in whole or in part, the magistrate's findings or recommendations." Brophy v. Halter, 153 F. Supp. 2d 667, 669 (E.D. Pa. 2001); 28 U.S.C. § 636 (b)(1)(c).

DISCUSSION

Plaintiff contends that the Magistrate Judge: (1) erred in concluding that there is substantial evidence in the record to support the ALJ's determination that Plaintiff was not disabled; (2) did not address Plaintiff's argument that she met or exceeded a Listing of Impairment for the musculoskeletal system; (3) failed to consider that the ALJ did not give full

and proper consideration to the Plaintiff's subjective complaints of disabling pain; (4) failed to consider Plaintiff's argument that the hypothetical questions posed by the ALJ did not contain all Plaintiff's symptoms and impairments; (5) did not address Plaintiff's argument that the ALJ had "pre-judged" the matter; and (6) did not address Plaintiff's argument that substantial evidence supports her claim for benefits under the Social Security Act.

I. There is Substantial Evidence to Support the ALJ's Conclusion that Plaintiff was not Disabled

The ALJ concluded that there were many jobs that Plaintiff could have performed on or before her last date insured. Vocational expert Rutherford cited to the substantial number of existing unskilled, sedentary positions that a person of the same age, educational background, past work history, and sitting/standing capabilities could perform. (Tr. 391).

Objective medical tests and medical testimony confirm that Plaintiff was not disabled. (Tr. 189, 196, 204). Significantly, treating Chiropractor Czopoth stated that Plaintiff could perform light work with some work restrictions. (Tr. 214). Although Plaintiff largely (indeed, almost exclusively) relies on her own testimony to show debilitating pain, the ALJ did not wholly believe her. (Tr. 345); Montes, at *2; Alvarez v. Secretary of Health and Human Servs., 549 F. Supp. 897, 899-900 (E.D. Pa. 1982) (citation omitted) (deference must be given to the ALJ's credibility findings). As I explain later in this Opinion, the ALJ's credibility determination was reasonable and has considerable evidentiary support. Accordingly, substantial evidence exists to support the ALJ's decision.

II. Plaintiff Does not Meet or Exceed a Listing of Impairment for the Musculoskeletal System

Similarly, Plaintiff's contention that the injury to her musculoskeletal system met

or exceeded a Listing of Impairment lacks medical support. Plaintiff again cites only to her own testimony and Chiropractor Snyder's opinion to support her argument that the radiating pain resulting from her protruding discs was sufficient to meet a Listing Impairment. (Written Objections, at 3-4). Once again, the ALJ found Plaintiff's complaints of debilitating symptoms to be "not wholly credible." (Tr. 345). The ALJ found more persuasive the considerable medical evidence (including MRI and EMG scans, as well as the opinion of Plaintiff's treating orthopedic surgeon) that claimant's musculoskeletal system was not sufficiently injured to meet a Listing of Impairment. (Tr. 343-347). The ALJ stated that "consideration has been given to the revised listings governing musculoskeletal disorders . . . [and] the evidence of record fails to establish that [the impairment was] of sufficient severity to meet and/or equal any of the relevant listings outlined in Appendix 1 on or before her last date insured." (Tr. 343). This finding is supported by substantial evidence. Accordingly, Plaintiff's contention is without merit.

III. The ALJ Gave Proper Consideration to Plaintiff's Subjective Complaints of Pain

Plaintiff contends throughout her Objections that the ALJ failed adequately to consider her complaints of disabling pain. In its September 27, 2002 opinion, this Court remanded for reconsideration in part because the ALJ "failed to assign proper weight to the plaintiff's subjective reports of pain." (Tr. 404). The Court directed that, on remand, the ALJ must:

- (1) evaluate the credibility of Plaintiff's reports of pain, properly taking into account the reports and testimony of chiropractors Snyder and Czopoth, and other record medical evidence; and
- (2) consider Plaintiff's consistent reports of pain to the SSA, her orthopaedic consultant, and her chiropractors during the relevant time period and weigh Plaintiff's hearing

testimony to the extent that it is consistent with her prior reports and may shed light on those periods of time between doctor's evaluations when her level of pain was not recorded.

(Tr. 414, 417). In assessing the Plaintiff's subjective allegations of pain, the ALJ undertook a detailed analysis of seven factors, including Plaintiff's daily activities, medication and treatment for pain relief, and the intensity, frequency, and duration of the symptoms. Employing these criteria, the ALJ found Plaintiff's subjective complaints of pain to be only partially credible.

The ALJ accepted Plaintiff's testimony that she had only the residual functional capacity to sit for 30 minutes and then stand for 30 minutes, or alternatively sit and stand at will. (Tr. 131, 344). The ALJ also found, however, that "[t]o the extent that the claimant has described totally debilitating symptoms and limitations . . . the claimant's subjective allegations are not wholly credible as they are inconsistent with her self-reported activities of daily activities at the time and are not corroborated by the overall medical evidence of record." (Tr. 345). The ALJ noted that Plaintiff was taking only over-the-counter medications for her pain. (Tr. 345). Once again, the ALJ relied on substantial medical evidence -- including an EMG, MRI, X-rays and doctors' opinions -- which contradicts many of Plaintiff's subjective complaints. (Tr. 345-346). The ALJ also noted that Plaintiff spent 6.5 hours a week cleaning her home, two hours a night cooking dinner, and four hours a week doing laundry. (Tr. 345). The ALJ found that these daily activities were inconsistent with Plaintiff's claims of totally debilitating symptoms. (Tr. 345).

The ALJ carefully considered the opinion of Chiropractor Snyder that Plaintiff was "decidedly disabled," but declined to give it "persuasive weight" in assessing the claimant's work-related capabilities. (Tr. 236, 347); 20 C.F.R. § 404.1513. Rather, the ALJ concluded that

the opinions of Dr. Dankmyer and Chiropractor Czopoth, as treating sources, were entitled to greater weight than the opinion of Chiropractor Snyder alone. The ALJ further noted that the opinions of Drs. Dankmyer and Czopoth were more consistent with the objective evidence.

Once again, Dr. Czopoth, who treated Plaintiff for more than ten years, never stated that Plaintiff's pain is so debilitating that it would completely prevent her from working. Rather, he concluded that Plaintiff could perform light work, with lifting and carrying restrictions. (Tr. 214). Similarly, Dr. Dankmyer -- Plaintiff's treating orthopedic surgeon -- although noting Plaintiff's consistent reports of pain, repeatedly referred to normal or unremarkable objective medical findings. (Tr. 189, 198).

Following a lengthy analysis of Plaintiff's subjective allegations of pain, the ALJ concluded that the "evidence fails to show that the claimant's current medically determinable impairments were of disabling severity on or before her date last insured." (Tr. 348). Accepting those subjective complaints of pain she deemed credible, the ALJ further found that "considering the claimant's . . . residual functional capacity, the claimant was capable of making a successful adjustment to work that existed in significant numbers in the national economy." (Tr. 349).

In its remand order, this Court directed the ALJ to consider Plaintiff's subjective complaints as well as the reports of Drs. Snyder and Czopoth; the Court did not order the ALJ to make specific credibility determinations. The ALJ followed the Court's remand directions and made credibility findings based on her "careful consideration of the entire record." (Tr. 349). That is precisely what this Court and law required of the ALJ. Perry, at *18-19. Because her credibility findings are amply supported, I may not disturb them.

IV. The ALJ's Hypothetical Question was Proper

Plaintiff contends that the ALJ failed to include a number of alleged impairments -- Plaintiff's subjective complaints of pain, inability to perform basic job functions, and exertional limitations -- in the hypothetical question posed to the vocational expert. Once an ALJ properly determines that an impairment is not supported by medical evidence in the record, however, she is not required to include such impairments in a hypothetical posed to a vocational expert. Randolph v. Barnhart, No. 03-3582, 2004 U.S. App. LEXIS 19146, *18 n.9 (8th Cir. Sept. 13, 2004) (citation omitted); Ridenbaugh v. Barnhart, 57 Fed. Appx. 101, 105-106 (3d Cir. 2003) (unpublished opinion); Chrupcala v. Heckler, 829 F.2d 1269, 1276 (3d Cir. 1987). Further, when an impairment would not limit a claimant's ability to perform the tasks required by the employment, the ALJ may omit the impairment from the hypothetical. See Ramirez v. Barnhart, 372 F.3d 546, 555 (3d Cir. 2004).

Again, there is substantial evidence to support the ALJ's decision to disregard many of Plaintiff's subjective complaints of pain. See Singleton v. Schweiker, 551 F. Supp. 715, 722 (E.D. Pa. 1982) (citing Jones v. Harris, 497 F. Supp. 161 (E.D. Pa. 1980)) (the ALJ is permitted to discredit a claimant's testimony when considering subjective complaints as long as the ALJ's decision provides clear and reasonable facts upon which the conclusion is based). Further, in the hypothetical presented to the vocational expert, the ALJ included the limitation that Plaintiff needs to alternate sitting and standing at 30 minute intervals, which the Court concluded was "due to pain and induced numbness." (Pl. Compl., Ex. 1, at 20). Thus, the ALJ did not wholly reject Plaintiff's subjective complaints of pain; rather, she incorporated into the hypothetical question those symptoms she deemed credible.

Plaintiff also contends that the ALJ failed to incorporate many factors that relate to Plaintiff's purported inability to perform basic job functions (as described in Dr. Anil Saxena's report), and other exertional limitations. A number of the cited factors, however, are not limitations. To the contrary, they indicate that Plaintiff has a fair ability to interact with co-workers and the public, a fair ability to make decisions, and a fair ability to react to deadlines or schedules. (Tr. 278-280). Further, the cited exertional limitations either were in fact incorporated into the hypothetical -- for example, sitting/standing limitations -- or would not limit Plaintiff's ability to perform the tasks required by employment. (Tr. 389).

In these circumstances, I can find no fault with the hypothetical question the ALJ posed to the vocational expert.

V. The ALJ did not "Pre-judge" the Case

Upon the Court's remand, this matter was assigned to a new ALJ. Plaintiff claims that "[q]uite frankly the ALJ at the July 2, 2003 hearing seemed to have already pre-judged the matter." (Written Objections, at 12). The record shows just the opposite: that the ALJ, in accordance with this Court's remand order, undertook a painstaking review of the voluminous record in this matter. The questions the ALJ posed to the Plaintiff, and the legal observations she made during the July 2, 2003 hearing, do not show "pre-judgment." See generally Liteky v. United States, 127 L. Ed. 2d 474, 114 S. Ct. 1147, 1157 (1994); Greater N.Y. Mut. Ins. Co. v. North River Ins. Co., 1995 U.S. Dist. LEXIS 4794, *4 (E.D. Pa. Apr. 10, 1995).

VI. Plaintiff Misstates this Court's Standard of Review

Finally, Plaintiff contends that substantial evidence supports her claim for benefits under the Social Security Act. Plaintiff has reversed the standard of review that controls here. I

am obligated to affirm the ALJ's decision if it is supported by substantial evidence. Montes, at *2. Plainly it is.

CONCLUSION

In sum, Plaintiff's Objections are based primarily on Dr. Snyder's opinion, and Plaintiff's own testimony that she is disabled. The ALJ's finding that Plaintiff is not disabled, however, is amply supported by medical evidence and the testimony of Plaintiff herself. The ALJ's decision to credit only some of Plaintiff's testimony, and her refusal to give persuasive weight to Dr. Snyder's opinion were reasonable and carefully considered. Accordingly, I adopt Judge Angell's Report and Recommendation and grant Defendant's Motion for Summary Judgment. An appropriate order follows.

Date

Paul S. Diamond, J.

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BARBARA J. HANDELONG,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	NO. 03-CV-6478
JO ANNE B. BARNHART,	:	
COMMISSIONER OF	:	
SOCIAL SECURITY,	:	
Defendant.	:	

Order

AND NOW, this 18th day of November, 2004, upon consideration of the cross-Motions for Summary Judgment, the Report and Recommendation of Magistrate Judge M. Faith Angell, and Plaintiff's Objections to the Report and Recommendation, it is ORDERED and DECREED:

1. Plaintiff's Objections to the Report and Recommendation are OVERRULED;
2. The Report and Recommendation is APPROVED and ADOPTED;
3. Plaintiff's Motion for Summary Judgment is DENIED; and
4. Defendant's Motion for Summary Judgment is GRANTED.

The Clerk of Court shall close this matter for statistical purposes.

BY THE COURT:

Paul S. Diamond, J.